NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

Filed: December 8, 1989

PEOPLE OF THE STATE OF CALIFORNIA,	)	E006239
Plaintiff and Respondent,	)	Super. Ct. No. OCR-13455
v.	)	
GREGORIO LOPEZ JIMENEZ,	)	OPINION
Defendant and Appellant.	)	

APPEAL from the Superior Court of San Bernardino County. DuYane M. Lloyd, Judge. Affirmed.

Appellate Defenders, Inc., Marjorie F. Cohn, and Howard C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Senior Assistant

Attorney General, Raquel M. Gonzalez and Robert P. Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Gregorio Jimenez of attempted murder (Pen. Code, §§ 664/187), during which he used a firearm (Pen. Code, § 12022.5) and inflicted serious bodily injury (Pen. Code, § 12022.7). He was sentenced to prison and appeals claiming jury instruction error and judicial misconduct.

FACTS

Jimenez and his cousin, the victim, had had a romantic relationship. Jimenez wanted to marry her, but she wanted to terminate the relationship. Jimenez went to her house and they argued about some papers but eventually resolved their dispute. When the victim reiterated her desire to end their affair, Jimenez threatened to "mess her up" and he said if he couldn't have her, no one else would. He pulled a gun out of his sock and pointed it at her telling her it had two

bullets for her and two for him, and that they were both going to die. Suddenly, the victim's son came in the room, so Jimenez put the gun in his back waistband. Jimenez left through the front door as the victim's son cried and yelled at him. The victim, who was at the front door, asked Jimenez if he had come over to upset her son. Jimenez responded, "No, I came over for this." At that, he fired the gun into the air, then aimed and shot twice at the victim, who had retreated inside, closing the door. He continued firing until he shot himself in the forehead.

Jimenez contended at trial that he had brought the gun to the victim's home because he was trying to sell it to her neighbor. When the sale did not go through, he put it in his sock because he was afraid to leave it in his car trunk, which did not lock. He said he threatened her with the gun to scare her because she had been "talking . . . rather

strong" to him about the termination of their relationship. He claimed the victim's son called him a bad name and the victim accused him of bringing the gun so he could shoot her. He maintained the conversation then returned to the issue of the papers, which was resolved. He walked out the front door, with the gun in his back waistband. As he neared his car, she told him to go "f--- himself." He took the gun out and fired one shot into the air "to scare her," as she stood at the front door. She closed the door. He claimed he fired another shot into the air, waited until he thought she would be sitting on the couch in the living room and fired two more shots into the door. He said at the time he shot into the door, he was "very angry, and. . . was trying to scare her. [He] felt very much offended." He later testified he didn't "know exactly [whether he] got angry [when she told him what to do with himself.]" He also said he did not know what he was thinking when

he fired into the door, then he claimed his only thought was to scare her, a position he reiterated throughout the remainder of his testimony. He fired the fifth shot into the ground and the sixth, he claims, accidentally hit his forehead. He said he was "very angry . . . very crazy, and . . . affected by the liquor [he had previously consumed]" when he fired the fifth shot.

In argument to the jury, the People maintained that Jimenez committed an attempted murder because he intended to kill the victim when he shot at her. Jimenez, on the other hand, argued that he only intended to scare her, and was, therefore, not guilty of the charged offense.

DISCUSSION

1. Jury Instructions

The jury was given the standard instructions on attempted murder, including the requirement that the People prove beyond a reasonable doubt that Jimenez intended to kill

the victim. Jimenez, as a tactical decision, chose to forego instructions on voluntary manslaughter, with its concomitant concepts of provocation and heat of passion. Jimenez now contends that the jury, sua sponte, should have been instructed that the intent to kill necessary to establish attempted murder may be negated by heat of passion and that his tactical decision to forego instructions on attempted voluntary manslaughter should not foreclose his present claim. We disagree.

Jimenez hinges his argument in large part on *Mullaney* v. *Wilbur* (1975) 421 U.S. 684. In *Mullaney*, the United States Supreme Court held that a Maine law which placed upon the defendant the burden of proving by a preponderance of evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter was a violation of the due process clause. The court noted:

"In this country the concept of malice

aforethought took on two distinct meanings: in some jurisdictions it came to signify a substantive element of intent, requiring the prosecution to prove that the defendant intended to kill . . .; in other jurisdictions it remained a policy presumption, indicating only that absent proof to the contrary a homicide was presumed not to have occurred in the heat of passion. . . . [I]n the past half century, the large majority of States have [come to] require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt." (*Id.* at pp. 695-696.)

The "expansive proceduralist view" (Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence* (1989) 40 Hastings L.J. 457, 465), expressed in *Mullaney*, was heavily criticized (see articles cited therein) and later redefined in *Patterson* v. *New York* (1977) 432 U.S. 197 in such a manner that it is no longer applicable to California's law on

homicide. In *Patterson*, the court upheld as not violative of the due process clause a New York law which placed upon the defendant the burden of proving by preponderance of the evidence that he acted under the influence of extreme emotional disturbance, a form of heat of passion. The court noted:

"[U]nder New York law . . . [t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does not provide an affirmative defense -- that the defendant acted under the influence of extreme emotional disturbance . . . which . . . would reduce the crime to manslaughter, an offense defined in a separate section of the statute. It is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he

demonstrates the mitigating circumstances. [¶] It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [Patterson] was charged.' . . . [¶] The Due Process Clause, as we see it, does not put New York to the choice of abandoning [the affirmative defenses to murder] or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment. [¶] To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." (*Id.* at pp. 205-210.)

The *Patterson* court noted the inapplicability of its holding in *Mullaney*, noting that under Maine law, in contrast to New York's, "malice, in the sense of the

absence of provocation, was part of the definition of [murder]." (*Id.* at p. 216.)

California law is like that of New York rather than Maine. Instructions that heat of passion may negate intent to kill, a concept with which we do not take issue, has never been required *apart from the jury's consideration of the crime of voluntary manslaughter*, an option foreclosed by Jimenez's tactical decision here. Disproving heat of passion is not an element of murder, therefore, there was no sua sponte obligation to instruct on it. We have no quarrel with instructing this jury that if it believed Jimenez acted under heat of passion, he could not have been guilty of attempted murder. We do, however, take issue with Jimenez's desire that this jury be told that he was *thereby also* not guilty of *any* crime. The law is quite contrary. If he acted under heat of passion, he is guilty of attempted voluntary manslaughter -- he is not legally blameless.

To give Jimenez what he wants would require us to allow all criminal defendants to pick and choose for which crimes they wish to run the risk of being convicted. Obviously, this we cannot do.

2. Judicial Misconduct

Two hours and forty-five minutes after the jury began its deliberations, it requested a readback. A little longer than one hour after the readback had been completed, the jurors reported to the court, "We are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." With no objection from either party, the trial court undertook to determine "if there is reasonable movement at this time." It did so by asking the foreperson how many votes had been taken and what their numerical division was, without saying which way the vote was going. She reported that between five and six votes had been taken and her recollection of the division was 7-5, 8-4, 9-3, and 9-2-1.

She added "there has been some movement in one direction." Since it was then late in the afternoon before a long weekend, the court dismissed the jury until the following court day, asking them to deliberate "at least for the morning to see if we have any further movement."

That morning, they deliberated another three hours, during which they asked for printed copies of the jury instructions and for a readback of counsel's arguments, the latter request being denied by the trial court. A half hour after returning from their lunch break, the jury reported, "We are in an impasse and request further direction." Again, without objection, the court decided to bring the jury out and determine "if there's been any substantial movement at all. If there has not been, then I'll have to declare a mistrial." The foreperson reported that there had been two or three votes since the court had last inquired and the last vote was

11-1. She confirmed that there had been substantial movement since then. The court asked the jury to "finish the rest of today and see where we are at that point in time." Two hours later, they reached a verdict.

Penal Code section 1140 prohibits a trial court from declaring a mistrial unless "it satisfactorily appears that there is no reasonable probability that the jury can agree" on a verdict. "The discharge of this responsibility necessarily requires that the court, in cases where the jury has been unable to reach agreement make the indicated determination of 'reasonable probability' and, in cases where in accordance with sound legal discretion [citations omitted] it is determined that such a probability exists, that it take appropriate action to encourage agreement. Thus, the court in such cases may inquire of the jury as to its numerical division without seeking to discover how many jurors are for conviction and how many are for

acquittal." (*People* v. *Carter* (1968) 68 Cal.2d 810, 815; accord, *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 776, fn. 14 ["[A] neutral inquiry into numerical division, properly used, is an important tool in ascertaining the probability of agreement."].) The only limit placed on the inquiry as to numerical divisions is that its results not be used to pressure minority jurors into voting with the majority. (*People* v. *Gainer* (1977) 19 Cal.3d 835, 841, 844-845.) In *People* v. *Sheldon* (1989) 48 Cal.3d 935, the trial court asked the deadlocked jury what its numerical division was. The jury said it was 11 to 1 in favor of the death penalty. The vote was said to be "firm," the deadlock "hopeless." Still, the trial court insisted on questioning individual jurors and when it did, it discovered that there was disagreement as to whether a rereading of the instructions might break the deadlock. The California Supreme Court found this procedure to be non-coercive.

In *People* v. *Cole* (1982) 31 Cal.3d 568, 582, the California Supreme Court held that directing a deadlocked jury to continue deliberations is not impermissible.

Nothing more than the two activities approved by the Supreme Court in *Cole* occurred here. Aside from these considerations, we note that the jury asked for reinstruction and readbacks after initially reporting its deadlock. In the second report, the jurors sought the direction of the trial court, indicating they did not believe the situation was totally hopeless. Once again the crucial inquiry was whether movement had occurred and they were sent back to further deliberate to see if more movement would take place. They had previously been instructed as to the legitimate factors they were to employ in reaching their decision. After the verdict was rendered, they were polled -- each confirmed that guilt was his or her individual verdict. While this was not factually a

complicated or long case, the crucial issue -- Jimenez's intent when he shot the victim -- was not easily discernible, especially in light of the victim's post-shooting conciliatory gestures towards Jimenez and Jimenez's profession of love for her. The jury deliberated less than two days.

We find nothing coercive in the manner in which the trial court determined the probability that the jury could reach a verdict. The court acted merely as a neutral observer, not as a cheerleader for some final determination. There was no error in this regard.

DISPOSITION

The judgment is affirmed.

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/s/ Hollenhorst

Acting P.J.

We concur:

/s/ McDaniel
J.

/s/ Dabney
J.